IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 3RD JULY 2007 / 12TH ASHADHA 1929

AS.No. 105 of 1993()

OS.172/1989 of PRINCIPAL SUB COURT, PALAKKAD

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APPELLANT: SECOND DEFENDANT

KRISHNAN, S/O.PALANIYANDI, RESIDING AT
KUBERAPATTANAM, PAZHANI DISTRICT,
TAMILNADU.

BY ADV. SRI.V.CHITAMBARESH

RESPONDENTS: PLAINTIFF & 2ND DEFENDANT

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1. MANI, S/O.PALANIYANDI, RESIDING AT
MENONPARA SUGAR FACTORY QUARTERS,
CHITTUR TALUK, PALAKKAD DISTRICT.

2. RAMAN, S/O.PALANIYANDI, RESIDING AT
RAILWAY COLONY, AKATHETHARA AMSOM,
PALAKKAD TALUK.

3. SIVAKAMI, W/O.RAMACHANDRAN, RESIDING
AT KARAKKATTU PARAMBIL, PUTHUR AMSOM,
PALAKKAD TALUK.

* 4. HARIPRASAD, S/O.MUKUNDAN, RESIDING AT
ANKANODAYAM, RAILWAY COLONY,
AKATHETHARA AMSOM, PALAKKAD TALUK.

(THE NAME OF THE 4TH RESPONDENT IS DELETED FROM
THE PARTY ARRAY AS PER ORDER DT.3.11.2004 IN
I.A.3707/04)

5. MOHANDAS, S/O. HARIPRASAD, RESIDING AT
ANKANODAYAM, RAILWAY COLONY,
AKATHETHARA AMSOM, PALAKKAD TALUK.

6. JAYANANDAN, S/O.HARIPRASAD, RESIDING AT
ANKANODAYAM, RAILWAY COLONY,
AKATHETHARA AMSOM, PALAKKAD TALUK.

7. CHITHRAPRASAD, S/O.HARIPRASAD, RESIDING AT
ANKANODAYAM, RAILWAY COLONY,
AKATHETHARA AMSOM, PALAKKAD TALUK.

8. PREMLAL, S/O.HARIPRASAD, RESIDING AT
ANKANODAYAM, RAILWAY COLONY,
AKATHETHARA AMSOM, PALAKKAD TALUK.

9. VIJAYALAKSHMI, D/O.HARIPRASAD,
RESIDING AT ANKANODAYAM, RAILWAY COLONY,
AKATHETHARA AMSOM, PALAKKAD TALUK.

BY ADV. SRI.T.C.SURESH MENON
SRI.N.K.KARNIS
SRI.PHILIP M.VARUGHESE
SRI.S.SHYAM

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 03/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S.No. 105 of 1993

Dated this the 3rd July, 2007.

J U D G M E N T

The second defendant in O.S.No. 172/1989, on the file of the Subordinate Court, Palakkad, is the appellant. The appeal is filed challenging the decree and judgment passed by the Trial Court, dismissing the suit filed by the first respondent for partition.

2. The short facts necessary for disposal of the appeal are as follows. The properties originally belong to Palaniyandi who died in the year 1969. He was married to Meenakshi who was no more. It was averred that in that relationship, the plaintiff and Pappammal were born. Pappammal died and defendants 4 to 9 are her children. Palaniyandi married another woman by name Kunjikavu, and in that relationship, defendants 1 to 3 were born. Kunjikavu also died in the year 1982. The suit was filed by the plaintiff claiming one-fifth share. The second respondent alone contested the suit. The status of the plaintiff as son of Palaniyandi was denied. The averments that Palaniyandi married Meenakshi, and plaintiff and Pappammal were children born in that wed lock were denied. It was

contented that the plaintiff did not have any right over the properties. It was also contented that in the year 1969, Palaniyandi executed a Will bequeathing the suit properties to Kunhikavu, defendants 1 and 2, and the wife of first defendant. It was contented that there was a lane building in the property, which was sold by defendants 1 to 3, to one Thomas and Mary. Some other properties were also assigned to Thomas and Mary in the year 1973. According to the first defendant, himself and his wife are the absolute owners of the remaining property, and plaintiff has got no right over the property.

3. The court below after trial found that Palaniyandi had executed Ext.B3 Will during his life time, and the execution of the same is properly proved. It was also held that the contention of the plaintiff that Palaniyandi was not having sound mind was not correct. It was found that Ext.B3 was a genuine document, and dismissed the suit. The plaintiff did not file any appeal. The second defendant who is another son of Palaniyandi has filed this appeal challenging the decree and judgment passed by the Trial Court.

4. According to the appellant, he is also one among the sons of Palaniyandi, and he is entitled to get a fractional share in the property of Palaniyandi. It is contented that the entire properties

belonging to Palaniyandi was bequeathed in favour of defendants 1 to 3 and their mother, and no property was given to second defendant. It is further contented that Ext.B3 is an unnatural Will, and same is brought into existence by defendants 1 to 3, exerting undue influence on Palaniyandi. Ext.B3 Will is stated to have been written by one Madhava Menon, and attested by P.Krishna Menon and C.Rajan Nair. The testator, scribe of the documents and the attestors were not alive at the time of the trial of the suit.

5. To prove the handwriting of Madhava Menon, his son was examined as DW.3. DW.2 is the son of one of the attestors, Sri.P.Krishna Menon. DW.4 is the nephew of Sri.C.Rajan Nair, who was the other attestors to the Will. Since the attestors and scribe were not alive on the date on which the execution of the Will was attempted to be proved, the first defendant examined Dws. 2 to 4. DW.2 was the son of the one of the attesting witness. He identified the signature of his father. He deposed that his father and Palaniyandi were social workers and friends. Though he was cross examined at length, nothing could be brought out to discredit his testimony. DW.4 is the nephew of other attestor, C.Rajan Nair. He gave evidence to the effect that Rajan Nair died unmarried and issueless. He also gave evidence to the effect that Rajan Nair was residing with him, and he

had prior acquaintance with the hand writing of the Rajan Nair. He identified the hand writing and signature of Rajan Nair. DW.3 is the sone of scribe, Madhavan Menon. He identified the hand writing of his father.

6. The learned counsel appearing for the appellant has argued that the evidence of DW.1 would indicate that the Will was not executed, as per the instructions of testator, but as per the instructions of the scribe. There is no material to show that the legatees under the Will exerted any undue influence on the testator to dis-inherit one of his sons and to give the entire property to other children. Merely because the appellant was not given any property, it is not possible to hold that Ext.B3 Will was not validly executed. The first respondent/plaintiff had got a case that Palaniyandi was bed-ridden and was not having a sound disposing state of mind. The Trial Court, after considering the evidence on record, held that there is no material to hold that Palaniyandi was not having any sound disposing mind, on the date of execution of the Will.

7. The learned counsel for the appellant further argued that the appellant was working in Tamilnadu, as could be seen from the address itself, and he was not aware of the suit, and hence, unable

to raise contentions. It is also argued that if an opportunity is given, the appellant would be able to prove that Ext.B3 Will was not a genuine document. It is true that appellant remained ex parte. But he did not file any petition under Order 9 Rule 13 of Civil Procedure Code for setting aside ex parte decree. In an appeal, this Court cannot consider as to whether the appellant was prevented by sufficient reasons in not contesting the matter, and can consider only whether the judgment and decree passed in this case suffers from any illegality. The Trial Court, after relying on the evidence of Dws. 2 to 4, held that Palaniyandi had bequeathed his properties in favour of defendants 1 to 3, first defendant's wife and their mother. That is a finding based on good evidence. Hence, I do not find any reason to interfere with that finding. So, the appeal is only to be dismissed.

In the result, the appeal is dismissed.

C.M.P.No.511/1993 in A.S.No.105/1993 is also dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

A.S.No.105 of 1993

J U D G M E N T

Dated: 3rd July, 2007.